IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LARRY MCNEAL	:	CIVIL ACTION
	:	
v.	:	
	:	
MARITANK PHILADELPHIA, INC.	:	
AND/OR TANKCLEANING INC.	:	
and	:	
MARITRANS HOLDINGS, INC.	:	
and	:	
MARITRANS GP INC.	:	NO. 97-0890

MEMORANDUM AND ORDER

HUTTON, J. June 30, 1998

Presently before the Court are the Defendants' Motion for Partial Summary Judgment as to Plaintiff's federal age discrimination and state law claims (Docket No. 49), Supplemental Motion for Summary Judgment (Docket No. 52), and Alternative Motion for Partial Summary Judgment With Regard to Damages (Docket No. 16), Plaintiff's various Responses (Docket Nos. 44, 55, and 56), and Defendants' Reply thereto (Docket No. 57). For the reasons that follow, Defendants' Motions are granted in part and denied in part.

I. BACKGROUND

In this action, Plaintiff Larry McNeal sues Defendants Maritank Philadelphia, Inc. and/or Tankcleaning, Inc., Maritrans Holdings, Inc., and Maritrans GP, Inc. (collectively "Maritank")[1]

[1] According to prior court filings, the second entity is a parent of the first, and the third no longer exists. Because the present motions do not address the basis, if any, for their

for alleged violations of the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. ("ADA) (Count I), the corresponding provisions of the Pennsylvania Human Relations Act, 43 Pa. Cons. Stat. Ann. § 951 et seq. ("PHRA") (Count II), and the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. ("ADEA") (Count III).[2]

McNeal was born on September 3, 1943, and was just under fifty years of age in the spring of 1993, when the following events took place. On February 14, 1993, Maritank ran an advertisement for an "Operator" position at its petroleum storage facility in the "Help Wanted" section of a newspaper called the Delaware County Sunday Times. McNeal saw the ad and responded by sending in a resume, and at some point in late February or early March, someone at Maritank contacted McNeal and invited him to appear for a written examination.

On March 10, 1993, McNeal and seven other male applicants met at Maritank to take a multiple-choice examination required for the Operator position. The exam tested the applicants' skills in arithmetic, mechanical aptitude and reading comprehension. Although he did not inquire about their ages, McNeal believed the other men appeared "considerably younger" than himself. At the

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asserted liability, the Court will reserve this question for a later time.

[2] McNeal also asserted, but later retracted, a claim of common law negligence (Count IV). McNeal concedes that Maritank is entitled to summary judgment on this count. Accordingly, summary judgment is granted.

exam, McNeal and another applicant, Joseph Borsello, briefly discussed the problem of age discrimination. Borsello, who was forty-four at the time, mentioned to McNeal that he had been experiencing age discrimination with other companies.

Initially, McNeal failed the Operator exam. Of the eight men who had taken the exam, only Borsello passed. Borsello advanced to the next stage of Maritank's hiring process, and was hired as an Operator on April 9, 1993. A few weeks later, however, Maritank lowered its testing standards. Because McNeal satisfied the revised standards, Maritank called him on April 16 and invited him in for an interview. Of the remaining seven applicants, only McNeal received an interview.

In late April, McNeal came in to Maritank and interviewed with Edward Wrezniewski, an Operator/Foreman and mechanic. At the interview, Wrezniewski asked McNeal to complete several forms. One of these forms, entitled "Notice to Applicant," recites that "any applicant offered employment with Maritank Philadelphia Inc. is required to undergo and pass a preemployment physical [examination]." McNeal took these forms home, completed them, and returned them to Maritank right away. Several days after the interview, Maritank's Manager of Administration, Connie M. Blinebury, called McNeal at home and advised him that the interview had gone very well. Blinebury then asked McNeal to go to Penn Diagnostic Center, Inc. for the required physical exam.

In 1992, well before the operative events in this litigation took place, Maritank hired an outside consultant, Danmar

Associates, to evaluate its Operator position and draft a Job Description and ADA Analysis. The description and analysis, together sixteen-pages long, examine the daily requirements of the position in excruciating detail, and conclude that "[t]he Plant Operator position would be federally classified as very heavy work." A checklist summary the ADA Analysis states that, on average, a Plant Operator must lift and carry up to fifty pounds approximately three to five hours a day, and between fifty and one hundred pounds approximately one to three hours a day.

In addition to commissioning the Danmar ADA analysis, Maritank retained the physicians of Penn Diagnostic to conduct preemployment physical examinations. Maritank carefully explained the nature of the Operator position to the physicians, and even brought them to Maritank's facility to observe and evaluate the nature of the position for which the doctors would be screening prospective employees. Finally, Maritank provided the physicians with copies of Danmar's description and analysis of the Operator position. Therefore, the Penn Diagnostic physicians were well acquainted with the nature and requirements of Maritank's Operator position.

On May 3, 1993, McNeal went to Penn Diagnostic for an examination with consulting physician Dr. Jack Stein. In the course of the exam, Penn Diagnostic took x-rays of McNeal's back and spine. Dr. Stein reviewed these x-rays and asked McNeal whether he had ever experienced any lower back problems. McNeal stated that two years earlier he had injured his back lifting a safe, but that he had no history of job-related injuries. After

reviewing the x-rays, discussing McNeal's medical history, and consulting the other physicians in his group, however, Dr. Stein concluded that McNeal had a back defect--congenital L4-5 spondylolysis without listhesis--and should not perform a job that involved heavy-duty lifting. Under the procedures established by Maritank and Penn Diagnostic, Dr. Stein then notified Blinebury that McNeal was "unfit" for the Operator position without communicating the specifics of McNeal's medical condition. Thereafter, on May 10, 1993, Blinebury contacted McNeal and informed him that he had not passed the physical examination, and that Maritank could not take him on for the Operator position.

McNeal protested Dr. Stein's finding and Maritank's decision. On May 11, McNeal called Dr. Stein and demanded to know why he had failed the physical examination. McNeal claims Dr. Stein told him that he had not failed the exam, but that he had merely mentioned McNeal's spondylolysis condition to Maritank. McNeal then called Blinebury and told her that Dr. Stein had said that he passed the physical, and mentioned the ADA in the conversation. On May 12, Dr. Stein called McNeal wanting to know why McNeal told Blinebury he had passed the physical. McNeal then called Blinebury and explained that he had performed heavy lifting of oil drums for twenty-three years for a former employer, and had never been injured or missed work due to heavy lifting-related back problems. He told them that his personal physician could confirm his statements about heavy lifting, and corroborate that he had never suffered a job-related back injury. On May 14, however, McNeal

received a letter from Blinebury advising him that he did "not meet the requirements for the job as Operator at Maritank Philadelphia Inc." At some point thereafter, McNeal received a separate letter from Dr. Stein explaining his diagnosis and recommendation.

Believing he was fully qualified to perform the Operator position with or without reasonable accommodation, and that his age may have played some role in Maritank's decision, McNeal brought his grievance to the Equal Employment Opportunity Commission ("EEOC"). He filled out an affidavit charging Maritank with discrimination on May 20, 1993. McNeal then filed similar charges with the Pennsylvania Human Relations Commission ("PHRC") on October 29, 1993, which were dual-filed with the EEOC. On April 26, 1995, McNeal received notice from the PHRC that it had dismissed his case without a finding of discrimination, and that he could proceed with a private action under the PHRA. Finally, On November 8, 1996, McNeal received his federal right-to-sue letter from the EEOC.

McNeal filed his Complaint on February 5, 1997. Counts I and II--the ADA and PHRA counts, respectively--charge Maritank with discrimination on the basis of a perceived disability--namely its perception of him as a person who might be especially prone to back injuries. Count III recites that McNeal is over forty years of age, and charges Maritank with age discrimination, in violation of the ADEA.

After a particularly tortured history of pre-trial discovery, Maritank filed the present raft of motions for partial summary

judgment. In them, Maritank seeks summary judgment on the merits of all counts, based on McNeal's failure to state a prima facie case of discrimination, or alternatively to offer any proof that Maritank's non-discriminatory explanation is pretextual. Maritank also seeks summary judgment on the ground that McNeal is entitled to no relief, due to his failure to mitigate damages. The Court reviews these arguments in the order they were presented.

II. DISCUSSION

A. Summary Judgment Standard

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In considering a motion, the court must draw all inferences in the light most favorable to the nonmovant. See Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992), cert. denied, 507 U.S. 912 (1993). Under the Rule 56 framework, the moving party bears the initial burden of proving that there exists no triable issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Where it has done so, the burden shifts, and the nonmovant must present affirmative proof that triable issues remain, or else face summary judgment. See Fed. R. Civ. P. 56(e). The non-movant cannot survive summary judgment merely by insisting

on its interpretation of the facts, or by relying on unsubstantiated allegations, general denials, or vague statements. See Celotex, 477 U.S. at 323; Trap Rock Indus., Inc. v. Local 825, 982 F.2d 884, 890 (3d Cir. 1992). The Court may not grant summary judgment, however, unless under the governing law no reasonable trier of fact could find in the nonmovant's favor. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986).

B. The Age Discrimination Claim

The ADEA provides that it shall be unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). See Falkenstein v. Neshaminy School Dist., No. Civ.A. 96-5807, 1997 SL 416271, *4 (E.D.Pa. July 14, 1997). These protections extend only to individuals between forty and seventy years of age. See 29 U.S.C. § 631(a); O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 312 (1996). Because the ADEA's prohibition against age discrimination so closely resembles the corresponding prohibitions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (1994), courts have adopted the preexisting law of Title VII to guide the analysis of ADEA claims. See Barber v. CSX Distrib. Serv., 68 F.3d 694, 698 (3d Cir. 1995). Thus, the analysis follows the evidentiary procedure first established by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), refined in

Texas Dep’t of Community Affairs v. Burdine, 450 U.S. 248 (1981),

and recently clarified in St. Mary's Honor Center v. Hicks, 509, U.S. 502 (1993). See Barber, 68 F.3d at 698.

To make out a case of "pretext" age discrimination under the McDonnell Douglas framework, as McNeal attempts here, an ADEA plaintiff must first establish a prima facie case. In the failure to hire context, the plaintiff must show:

> (1) that he belongs to the protected class;
> (2) that he applied for and was qualified for the job;
> (3) that despite his qualifications he was rejected; and
> (4) that the employer ultimately filled the position with someone sufficiently younger to permit an inference of age discrimination or continued to seek applicants from among those having plaintiff's qualifications

See id. (quoting Fowle v. C & C Cola, 868 F.2d 59, 61 (3d Cir. 1989)).

Once the ADEA plaintiff has established a prima facie case, the law creates a presumption of unlawful discrimination, and the evidentiary burden shifts to the defendant to articulate a legitimate non-discriminatory explanation for the employer's adverse hiring decision. See id. If the defendant can introduce evidence that, if taken as true, would permit the conclusion that there was a nondiscriminatory reason for the adverse action, the presumption of discrimination "having fulfilled its role of forcing the defendant to come forward with some response, simply drops out of the picture." Hicks, 509 U.S. at 509-10. "The defendant's 'production' (whatever its persuasive effect) having been made, the trier of fact proceeds to decide the ultimate question: whether

plaintiff has proved that the defendant intentionally discriminated against him because of his [age]." Id. (quoting Burdine, 450 U.S. at 253) (quotations omitted). At the summary judgment stage, this means that the plaintiff must come forward with evidence that permits a reasonable inference of actual discrimination, or else face summary judgment. See Restivo v. SKF USA, Inc., 856 F. Supp. 236, 240 (E.D.Pa. 1994).

1. Prima Facie Case

Turning first to McNeal's prima facie case of age discrimination, Maritank concedes that the first two elements are satisfied, and assumes arguendo that the third is satisfied as well. Maritank argues, however, that McNeal cannot satisfy the fourth element of the prima facie case because Maritank hired Joseph Borsello, who was forty-four at the time, contemporaneously with its rejection of McNeal. It argues that because Borsello was "insignificantly younger" than McNeal, and because, of the original applicants for the Operator position, only McNeal and Borsello--both over forty--got past the interviewing stage, there can be no presumption of unlawful discrimination.

Although the cases provide some support for Maritank's position, see O'Connor, 517 U.S. at 312-13 (ruling that the fourth element "can not be drawn from the replacement of one worker with another worker insignificantly younger"); Falkenstein, 1997 WL 416271, *4 (finding fourth element of prima facie case unproven where age differential was four years and defendant filled at least

one of seven positions with a person over 40), the Court finds that McNeal has satisfied the minimal burden of establishing his prima facie case. In Barber, the Third Circuit endorsed the Ninth Circuit's finding in Douglas v. Anderson, 656 F.2d 528 (9th Cir. 1981), that an age difference of five years between the plaintiff and replacement employee is sufficient to satisfy the fourth element. See Barber, 68 F.3d at 699. In this case, as McNeal points out, Maritank actually hired Borsello a month before rejecting McNeal for employment.[3] Maritank's next Operator hire was Frank Kirkman, age forty-one when hired in June 1993, and therefore eight years younger than McNeal. But even if the Court found that it was appropriate to compare McNeal with Borsello for this purpose, it would find that their five year difference in age was sufficient to meet the minimal requirements of establishing a prima facie case. See id. Accordingly, the Court finds that McNeal has met the purely formal requirements of the prima facie case, and triggered Maritank's evidentiary burden to produce a legitimate nondiscriminatory explanation for its hiring decision.

[3] Since its articulation in McDonnell Douglas, the language of the fourth element has been quite clear in looking forward, rather than backward, towards the defendant's hiring conduct after rejecting the plaintiff. While the Court agrees that Maritank's decision to hire Borsello and a number of other employees within the protected class is highly relevant, it finds that these facts are more relevant to the pretext stage of the ADEA analysis.

2. Nondiscriminatory Explanation

Maritank next contends that even if McNeal can establish a prima facie case of age discrimination, Maritank refused to hire McNeal for the legitimate reason that he was unfit for the Operator position and there exists no evidence by which McNeal can establish pretext. The Court agrees. After a full consideration of the facts, there is no reasonable inference that Maritank refused to hire McNeal because of his age.

First, Maritank states that it refused to hire McNeal solely on Dr. Stein's recommendation. Maritank selected McNeal to take the Operator exam, come in for an interview, and advance to the stage of a preemployment medical exam without any apparent difficulty with his age. McNeal did not--and does not--challenge Dr. Stein's medical findings, but only argued that Maritank should have considered additional information in making its decision. Finally, in her deposition, Connie Blinebury testified that had he not been found medically unfit for the job, Maritank would have extended McNeal the Operator position. The Court finds this to be clear evidence that it was McNeal's back, rather than his age, that caused him to lose the job.

In addition, Maritank offers that its contemporaneous hiring of Joseph Borsello, and the fact that of the original group of applicants only McNeal and Borsello advanced to the interview and preemployment physical exam stages, vitiates any inference of age discrimination. Further, in an affidavit, Maritank's Director of Human Resources states that at the time of Maritank's decision not

to hire McNeal, three of its seven Operators were over the age of forty, and at the time of the affidavit five of its nine Operators were over forty. The Court agrees with Maritank that the circumstances of McNeal's rejection and the objective evidence of Maritank's hiring practices virtually eliminate any concern of age discrimination.

McNeal, however, argues that Maritank's explanation of its hiring decision is a pretext for intentional discrimination. In support of this, McNeal relies upon his own conjecture that the other applicants for the Operator position were younger than him. Even if this was true, the Court cannot see how this fact would create an inference of discrimination, because McNeal does not allege that Maritank performed any selection in arriving at the original applicants. Rather, it appears these applicants were simply those who responded to the original newspaper advertisement. If indeed these applicants were younger than McNeal, it is not at all surprising that young people would express a stronger interest in an occupation that involves a great deal of heavy lifting. But even if Maritank did engage in some selection to arrive at the original applicant pool, the only two applicants it selected from that pool were over forty-four years of age. This hardly suggests an intent to discriminate. Indeed, Borsello, who told McNeal of his perception of age discrimination at other companies did not experience these problems at Maritank, which finally hired him.

McNeal also offers a list of facts that he contends support an inference of intentional discrimination. First is the fact that

Alex Karras, who conducted Danmar's 1992 ADA Analysis, testified in his deposition that the condition of Spondylolysis would tend to worsen with age. Even if this outside consultant's statements were in some way pertinent to Maritank's decision, they acknowledge a simple medical fact, and create no inference of age discrimination whatsoever. The same is true of Dr. Stein's deposition testimony that McNeal's advancing age made him more prone to back injuries. It is simply absurd to deem such a statement as evidence of discrimination.

Next, McNeal offers the supposed contradictions in the testimony of Blinebury and Dr. Stein as to whether McNeal passed or failed his physical. The Court finds these "contradictions" to be inconsequential communication errors that may have originated with McNeal himself, to which McNeal now attributes unwarranted significance.

Finally, McNeal offers that the next six Operator hires after McNeal's rejection ranged in age from twenty-two to forty-one, with only one, Frank Kirkman, actually over the age of forty. While this may be so, the Court in Falkenstein found that a school district that filled one of seven new positions with an applicant over forty years of age rebutted a plaintiff's attempt to establish a prima facie case of discrimination. See Falkenstein, 1997 WL 416271, *5. In any case, McNeal's argument is meaningless without information about the age composition and qualifications of the applicant pool that resulted in the subsequent hires. Most of all, McNeal's argument ignores the larger--and undisputed--picture that

at all times since 1993, when the operative events of this litigation took place, more than 40% of Maritank's Operators have been over the age of forty.

In view of these facts, the Court finds that McNeal has produced no reasonable basis on which a jury might conclude that he was the victim of intentional age discrimination. Accordingly, Maritank's motion for summary judgment as to Count III of McNeal's Complaint is granted.[4]

C. The PHRA Claim

McNeal's remaining claims charge Maritank with discriminating against him on the basis of a perceived disability. As Maritank first attacks McNeal's PHRA claim, the Court will begin its analysis with this state law claim.

The PHRA makes it an unlawful discriminatory practice "[f]or any employer because of race, color, religious creed, ancestry, age, sex, national origin or non-job related handicap or disability to refuse to hire or employ, or to bar or to discharge from employment such individual...if the individual is the best able and most competent to perform the services required." 43 Pa. Cons. Stat. Ann. § 955(a) (West 1991 & Supp. 1997). The PHRA mirrors the federal discrimination statutes in text and structure, and the courts have applied to it the McDonnell Douglas analysis applicable

[4] Plaintiff's PHRA claim in Count II appears to be for disability rather than age discrimination. To the extent that its states a claim for age discrimination, however, the Court grants summary judgment on the same grounds as on McNeal's ADEA claim.

to analogous federal claims. See Matczak v. Frankford Candy and Chocolate Co., 136 F.3d 933, 935 n.1 (3d Cir. 1997; Sicoli v. Nabisco Biscuit Co., No.Civ.A. 96-6053, 1998 WL 297639, *11 (E.D.Pa. June 8, 1998) (Hutton, J.).

To state a prima facie case of disability discrimination under the PHRA, a plaintiff must show:

> (1) That he was a member of a protected minority;
> (2) That he applied for a job for which he was otherwise qualified;
> (3) That his application was rejected because of his handicap; and
> (4) That the employer continued to seek qualified applicants.

See Action Indus., Inc. v. Pennsylvania Human Relations Commission, 518 A.2d 610, 611 (Pa. Cmwlth. 1986). As with the federal discrimination statutes, once a plaintiff has made out a prima facie case, the burden shifts to the defendant to state a legitimate nondiscriminatory explanation. Action Industries, however, established a special safe-harbor for employers charged with disability discrimination who reasonably relied upon the opinion of a medical expert in deciding not to hire a certain job applicant. See id. at 612-13. Maritank now asserts this defense to McNeal's PHRA claim, arguing that it reasonably relied upon Dr. Stein's medical opinion that McNeal was unfit for the Operator position. Under the almost identical facts of this case, the Court agrees.

In Action Industries, plaintiff Timothy Vogt applied for a position as a temporary warehouse worker with defendant Action

Industries. The position involved heavy manual labor, including the regular lifting of loads of up to sixty-five pounds. See id. at 611. Vogt succeeded in his job interview and Action gave him a conditional offer of employment, pending the results of a physical examination to which he had agreed in his original application. Unfortunately for Vogt, the examination revealed that he suffered from rotary lateral scoliosis of the spine, and the doctor concluded that Vogt should not do heavy lifting of the kind the job required. The doctor informed Action of his medical opinion that Vogt was unfit for the position and, agreeing, Action declined to offer the job to Vogt. See id.

Upset with the result, Vogt filed a complaint with the PHRC, claiming that Action's conduct amounted to disability discrimination. Vogt based his position on the testimony of two doctors that although Vogt did have the condition diagnosed, it would not preclude him from fully performing his job without any increased risk of injury. See id. at 612. The PHRC hearing examiner agreed and awarded Vogt damages.

Upon appeal, the Commonwealth Court stated that the precise issue was:

> whether an employer who has refused to hire an individual based upon the employer's perception of a job-related handicap has a legal defense under commission Regulation 44.4 to a charge of discrimination, where the employer's perception and determination not to hire stemmed from its reliance upon the opinion of a medical expert.

Id. Focussing on the PHRA's ultimate requirement that a plaintiff prove intentional discrimination, the court answered its question in the affirmative:

> Central to establishing discriminatory intent is the mind-set of the employer at the time of its alleged discriminatory conduct. Thus, the fact that, subsequent to the applicant's rejection certain facts of which the employer was previously unaware come to light, cannot operate to create retroactively an intent to discriminate. We therefore believe that in cases of disparate treatment based upon handicap or disability, an employer can have a good-faith defense which negates its intent to discriminate where it reasonably relies upon the opinion of a medical expert in refusing to hire an applicant.

Id. (emphasis added). Applying the new standard, the court found that Action's reliance upon the doctor's opinion was reasonable and reversed the PHRC's award of damages.

The present case is almost identical. Maritank sent McNeal to be examined by Dr. Stein. Dr. Stein found that McNeal suffered from a medical condition that, given the strenuous nature of the job, made McNeal unfit for the Operator position. Although McNeal told Maritank that his own private physician could corroborate his story that he had never suffered work-related back injuries, Maritank was nevertheless reasonable in relying on Dr. Stein's diagnosis that McNeal faced an increased risk of injury in the future. Accordingly, Maritank's Action Industries defense is

complete, and the Court grants Maritank summary judgment as to Count II of McNeal's Complaint as well.[5]

D. The ADA Claim

Maritank finally moves for summary judgment as to McNeal's ADA claim. For reasons unclear to the Court, Maritank does not argue that McNeal was unqualified to perform the essential functions of the Operator position. Instead, Maritank argues that McNeal judicially admitted that he was unqualified for the position when he attempted to rebut Maritank's motion for summary judgment as to damages. Finally, Maritank argues it is entitled to summary judgment because McNeal failed to mitigate his damages by finding other work. Both of these arguments, however, rely on factual comparisons between Maritank's Operator position and other positions that McNeal might have taken. The Court is unwilling to make these determinations at the summary judgment stage. Accordingly, the Court denies Maritank summary judgment on either of these grounds, and for the time being McNeal's ADA claim survives.

[5] McNeal does not contest that Action Industries is controlling law in Pennsylvania. Instead, McNeal advances the self-defeating argument that the ADA "preempts" the PHRA. If this was so, which it is not, then McNeal would have no claim under the PHRA to begin with. McNeal, however, appears to claim that the ADA "preempts" the Action Industries defense alone, for reasons that are unclear. This contention is entirely lacking in foundation.

III. CONCLUSION

For the foregoing reasons, the Court grants Maritank summary judgment as to Counts II and III of McNeal's Complaint, and denies summary judgment on Count I, McNeal's ADA claim.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LARRY MCNEAL	:	CIVIL ACTION
	:	
v.	:	
	:	
MARITANK PHILADELPHIA, INC.	:	
AND/OR TANKCLEANING INC.	:	
and	:	
MARITRANS HOLDINGS, INC.	:	
and	:	
MARITRANS GP INC.	:	NO. 97-0890

O R D E R

AND NOW, this 30th day of June, 1998, upon consideration of the Defendants' Motions for Summary Judgment and Plaintiff's responses thereto, IT IS HEREBY ORDERED that:

(1) Summary judgment is **GRANTED** as to Counts II, III, and IV of Plaintiff's Complaint; and

(2) Summary Judgment is **DENIED** as to Count I of Plaintiff's Complaint.

BY THE COURT:

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HERBERT J. HUTTON, J.